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# In the Supreme Court of the United States

OCTOBER TERM, 1965

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No. 446

SNC MANUFACTURING CO., INC., PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

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## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-5) is not yet reported. The Board's Decision and Order (R. 293-298)[1] are reported at 147 NLRB 809.

### JURISDICTION

The decree of the court of appeals was entered on May 13, 1965 (Pet. App. 6-7). The petition for a

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[1] "R" refers to the portions of the record printed as a joint appendix in the court below.

writ of certiorari was filed on August 11, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's finding that a majority of the employees provided the union with valid authorizations to represent them for collective bargaining purposes.

2. Whether the Board properly directed the employer to bargain with the union.

## STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), are set forth at App. 8-9 of the petition. Section 8(a)(5) of the Act, also relevant herein, provides:

> Sec. 8(a) It shall be an unfair labor practice for an employer—
>
> * * * *
>
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

## STATEMENT

### A. THE BOARD'S FINDINGS OF FACT

1. Late in 1962, the Union [2] began an organizing campaign at petitioner's plants (R. 299; 17-19). At

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[2] International Union of Electrical, Radio and Machine Workers, AFL-CIO.

a meeting with some of petitioner's employees on February 20, 1963, Ellis Holland, Union field representative, explained that, once a majority of the employees demonstrated that they wanted the Union by signing authorization cards, the Company could voluntarily recognize it as the bargaining agent or the Union could petition for an election. With respect to the latter possibility, Holland explained the Board's rule requiring a 30 percent showing of interest [3] as a condition precedent to processing an election petition, but added that it was Union policy not to file a petition unless the Union had a 60 to 65 percent showing of support. The employees present at the meeting were given authorization cards to sign and additional cards for their fellow employees (R. 300-301; 101-102, 109-110, 119, 189-191). During the next several days, cards were circulated in the plants, and, by February 25, 51 of the Company's 76 production and maintenance employees had signed them (R. 300-301; 284-286).[4]

The authorization cards were headed: "Petition and Authorization to Show That I WANT AN N.L.R.B. ELECTION NOW," and contained the following two paragraphs:

> I, the undersigned, an employee of _____ hereby authorize the International Union of Elec-

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[3] National Labor Relations Board Rules and Regulations and Statements of Procedure, Sec. 101.17-101.18, 29 C.F.R. 101.17-101.18; see also *National Labor Relations Board* v. *J.I. Case Co.*, 201 F.2d 597, 598-600 (C.A. 9).

[4] It was stipulated that petitioner had 76 production and maintenance employees as of March 2 (R. 302; 139-140, 284).

> trical, Radio and Machine Workers, I.U.E.-AFL-CIO to petition the National Labor Relations Board for an election as soon as possible.
>
> I authorize the I.U.E.-AFL-CIO to act as my bargaining agent with the Company in regard to wages, hours and working conditions.

There followed spaces for the employee's name, address, signature and other relevant information (R. 285).

In accordance with the language on the cards, Union Representative Holland advised the employees to whom he spoke on February 20 that the cards would be used for the dual purposes of requesting recognition and an election. Four of the employees who attended this meeting signed cards and were the principal Union solicitors (R. 54, 92, 109-110, 119). Three employees testified that the solicitors informed them that the purpose of signing the card was to join the Union or to have the Union as their representative (R. 320-321; 145-146, 81, 149). And two employees, who understood that the cards authorized the Union to represent them, testified that the solicitors did not tell them that there would have to be an election (R. 79, 82). Ten employees who obtained cards from Union solicitors did not reveal what, if anything, they were told when they were given cards (R. 74, 135-136, 142-143, 146-148, 176, 180-181, 202-203, 208-209, 168, 177-178). Five employees stated that they were told there would be an election, but no employee claimed that he was told that the sole purpose of the cards was to obtain an election (R. 77, 151, 158, 184-185). Fourteen other employees obtained their

cards from an unattended box left in the ladies' restroom (R. 88, 91, 125-126, 127-128, 133, 152, 156, 173, 198-199, 205, 244-246, 129, 162-163, 171).[5] No testimony was offered as to thirteen of the cards (R. 320).

Plant Superintendent Esslinger addressed petitioner's employees on the morning of February 26 and told them that he knew about the Union meetings and who was working for the Union. He suggested that, to maintain the "one big family" relationship between the Company and its employees, it would be better if the employees could bargain directly with management, perhaps through a shop committee. After discussing with the employees the benefits they wanted, he asked them "to, among themselves, elect or appoint * * * a representative group to meet with management and iron out their differences." Shortly after Esslinger's talks, a joint meeting was held at which the employees discussed the pros and cons of a shop committee as opposed to the Union (R. 301-302; 18-23, 45-46, 56-58, 93-94, 102, 111-113, 120-122, 199-200, 209-212). This issue was put to a vote, and, while no formal count was taken, a substantial majority indicated a preference for the Union (R. 302; 58, 94, 113).

2. On March 1, the Union informed the Company that it had been designated by a majority of the production and maintenance employees as

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[5] Employee solicitor Lewis put the box there, sealed it, opened the top so that the cards could be inserted, and placed blank cards behind the box. She employed this system as "there wasn't much time" to solicit (R. 110).

their representative and requested recognition and bargaining (R. 302; 283, 24). On March 5, Plant Superintendent Esslinger and Vice-President Daseke replied that the Company had no knowledge of the Union's majority status, that the employees should be allowed to express their desires by secret ballot, and that therefore recognition would not be granted unless a majority of the employees voted for the Union in a Board-conducted election (R. 302; 283, 214). Also on March 5, the Union filed with the Board a petition for an election, which Esslinger learned of on March 6 or 7 (R. 302; 25-26, 257, 283.) On March 15, the Company and the Union entered into a "Stipulation for Certification Upon Consent Election," calling for an election on April 1 (R. 305; 44, 257, 259).

Thereafter, the Company engaged in an active campaign to dissuade the employees from voting for the Union. By letter dated March 7, the Company advised its employees that they were to be granted certain new benefits (R. 265).[6] From March 18 to 28, Esslinger systematically interviewed all the Company's employees individually, during working time, either in his own office or the offices of other management officials (R. 308, 217-218). He interrogated numerous employees as to their views about the Union and why they preferred it to a shop committee, and he criticized the failure to approve such a committee, pointing out that the Company could do as much for its employees as a union could (R. 308;

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[6] The new benefits correspond to the benefits requested by employees at the February 26 meetings (R. 303, 313).

59-60, 78, 82, 87-88, 116-117, 136, 137-138, 152-153, 200-201). Esslinger asked one employee whether she would still want the Union if she were to receive a 5 percent wage increase and better working conditions (R. 309-310; 202-203). To another, he stated that Allen-Bradley was one of the Company's largest customers, that the Company needed this account to stay in business, but that he did not think that Allen-Bradley would continue to buy S.N.C. products if the Union got in (R. 308-309; 86). Esslinger told another employee that, if the Union came in and a strike occurred, customers would not buy the Company's products "and then we [the employees] would lose out of a job" (R. 309; 150-151). Another employee was told that, if the Union got in, Allen-Bradley "perhaps wouldn't buy our coils" (R. 183-184).

Esslinger's statements that work would be lost if the Company were unionized (R. 44-45, 220-221) were reinforced by six letters sent by the Company to its employees during the period March 14-29. The first five letters were signed by Esslinger and emphasized, *inter alia*, that the employees might be without jobs if they selected union representation (R. 266-272). The final letter, dated March 29, three days prior to the election, contained a personal plea from Company President Vette for a vote against union representation (R. 273). Attached thereto were letters from Simberkoff Sales Company and Scott Electronic Sales, paid sales representatives of S.N.C., which Vette "thought might be of interest to the employees." Simberkoff's letter, after expressing concern

over the possible unionization of the Company's plants and pointing out that the "consistent volume of business" from the larger customers is based on the Company's "present labor setup," stated (R. 274):

> These large customers have come to depend upon us as they do because they know we will not put them in a bind for transformers due to labor difficulties. Even though they may have unions in their own plants, they questioned us when they first started doing business with us whether we had a union or not, and I know it was the fact that we have had no labor difficulties which prompted them to give us the good long run items that have continued for some years, and are still running.

The Scott letter, in pertinent part, asserted (R. 275):

> * * * In the past we have been able to secure many orders due to the fact that you have a non-union shop. Many of our customers have placed orders with us rather than our competitors due to this one factor.
>
> We were very concerned when we learned there was a possibility of a union going in at SNC. We feel we may be handicapped in future sales if the Union is established.

3. On April 1, the Regional Director conducted an election among the Company's employees at which 75 of the 76 eligible voters cast ballots—32 voted for the Union, 42 against, and 1 ballot was challenged. On April 5, the Union filed objections to the election, alleging that the Company had interfered with employee free choice by threatening employees with loss

of jobs and other economic reprisals, interrogating them concerning their union activities, granting wage increases and other benefits to influence votes, and attempting to assist the formation of an independent union (R. 298; 256, 257-258). Thereafter, the Union filed unfair labor practice charges, alleging that, by the foregoing action and its refusal to bargain with the Union, the Company had violated Sections 8(a)(1) and (5) of the Act (R. 298).[7]

The complaint based on the unfair labor practice charges was issued on July 17 and consolidated for hearing with the objections to the election (R. 298).

### B. THE BOARD'S DECISION AND ORDER

The Board concluded that the Company violated Section 8(a)(1) of the Act by promising and granting benefits to employees in order to dissuade them from union representation; urging employees to form a shop committee and deal with the Company through it rather than through the Union; granting wage increases and promising further benefits after consultation with the Liaison Committee; interrogating employees concerning their union activities and giving them the impression that those activities were under surveillance; and threatening employees with eco-

[7] The Union later amended its charge to allege a violation of Section 8(a)(2), based on the Company's unilateral establishment in mid-April of a Liaison Committee, composed of 6 employees selected by management, whose function was to handle any problems concerning working conditions which might arise (R. 311; 36-37, 53, 99, 104, 223, 225, 237-238, 431-432, 454-455, 241, 277).

nomic reprisal if they selected union representation (R. 294, 312-317).[8]

The Board further concluded that the Company violated Sections 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union (R. 294-296). The Board found, contrary to the Company's contention, that the Union, when it requested recognition, had valid designation cards signed by a majority of the employees in the appropriate unit. The Board also rejected the Company's contention that its refusal to recognize or bargain with the Union was based on a good faith doubt of the Union's majority status. For, "in view of the extensive and flagrant violations of Section 8(a)(1) engaged in by [the Company] which followed the Union's demand, [the Company's] refusal on March 5 to recognize and bargain with the Union without a Board certification was not based on a good-faith doubt of the Union's majority but was for the purpose of undermining that majority status" (R. 295).[9]

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[8] The Board also found that the Company violated Section 8(a)(2) of the Act by dominating, assisting, and supporting the Liaison Committee (R. 294-295, 317-318).

[9] In reaching these conclusions, the Board adopted its Trial Examiner's factual findings (R. 320-321, n. 32). The Trial Examiner, relying on *Aiello Dairy Farms*, 110 NLRB 1365, held that the Union had "waived" the violation of Section 8(a)(5) by proceeding to an election with knowledge of the facts concerning the Company's refusal to bargain (R. 318-319). The Board, in *Bernel Foam Products Co., Inc.*, 146 NLRB 1277, reversed the waiver rule of *Aiello* and therefore did not apply it here (see *infra*, pp. 13-14).

The Board's order requires, *inter alia*, that the Company cease and desist from the unfair labor practices found and bargain with the Union on request (R. 296-297, 323-325).[10]

### C. THE DECISION OF THE COURT OF APPEALS

The court of appeals found that the Board's findings were supported by the evidence and enforced the Board's order in full (Pet. App. 2-3). Judge Burger, concurring, agreed "that the record contains sufficient evidence to support the Board's conclusions that the Union had a majority of the employees at the time of its demand for recognition and that the employer had no good faith reason to doubt that fact" (Pet. App. 3-4).

## ARGUMENT

The decision of the court of appeals is correct and there is no conflict of decisions. There is no occasion for further review.

1. The Company contends (Pet. 11-13) that the Union improperly used its authorization cards to prove its majority status because, petitioner argues, the signers did not intend to authorize representation, but meant only to request that an election be held. This question turns on the facts peculiar to the case and, therefore, raises only an evidentiary issue which is not appropriate for review by this Court. See

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[10] The Board also sustained the objections to the election and dismissed that proceeding (R. 296).

*Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491.

In any event, petitioner's contention is without merit. The language on the cards indicated that they were to serve two purposes—to authorize the Union to act as bargaining agent and also to furnish support for a Board election (*supra*, pp. 3-4). There is no indication that Union solicitors told the employees that the cards would be used solely for the purpose of obtaining a Board election (*supra*, p. 4). In these circumstances, it has consistently been held that the cards constitute a valid designation of the union's representative status, and they may not be impeached by testimony of employees, given long after the cards were obtained,[11] that they had a different intention.[12] Furthermore, the vote taken at the employees' meeting on February 26 (*supra*, p. 5) shows that the Union properly claimed the support of the majority of petitioner's employees.

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[11] Thus, some of the employees testified that, from a general discussion in the plant, they thought there would be an election (See, *e.g.*, R. 90, 92, 126, 128, 135).

[12] *National Labor Relations Board* v. *Winn-Dixie Stores, Inc.*, 341 F. 2d 750 (C.A. 6), petition for certiorari pending, No. 295, this Term; *National Labor Relations Board* v. *Greenfield Components Corp.*, 317 F. 2d 85, 89 (C.A. 1); *National Labor Relations Board* v. *Stow Mfg. Co.*, 217 F. 2d 900, 902 (C.A. 2), certiorari denied, 348 U.S. 964; *National Labor Relations Board* v. *Geigy Co.*, 211 F. 2d 553, 556 (C.A. 9), certiorari denied, 348 U.S. 821; *Joy Silk Mills* v. *National Labor Relations Board*, 185 F. 2d 732, 743 (C.A. D.C.), certiorari denied, 341 U.S. 914; *National Labor Relations Board* v. *Sunshine Mining Co.*, 110 F. 2d 780, 790 (C.A. 9), certiorari denied, 312 U.S. 678.

*National Labor Relations Board* v. *Peterson Bros.*, 342 F. 2d 221 (C.A. 5), is distinguishable on its facts. The Fifth Circuit concluded that the card in *Peterson*, worded somewhat differently from the one here, was ambiguous on its face (342 F. 2d at 224). Furthermore, the court, upon analysis of the evidence, found that at least four employees—all necessary to give the union a majority—had misunderstood the card (*id.* at 225). There was no such evidence here. Also distinguishable is *National Labor Relations Board* v. *Koehler*, 328 F. 2d 770 (C.A. 7). There, unlike here, the court found that the union organizers had led the employees to believe, at the time they signed the cards, that the cards would only be used to obtain an election (328 F. 2d at 773).

2. Petitioner also contends (Pet. 17-19) that the Board exceeded its authority in ordering the Company to bargain with the Union on the basis of its card majority, because, by proceeding to an election in the face of the Company's refusal to bargain, the Union must be deemed to have waived its right to file unfair labor practice charges respecting that conduct. The Board had enunciated this waiver rule in *Aiello Dairy Farms*, 110 NLRB 1365, but subsequently found that it did not serve the policies of the Act. As the Board explained in *Bernel Foam Products Co.*, 146 NLRB 1277, 1280, which was followed here:

> * * * [T]here is no warrant for imposing upon the union * * * an irrevocable option as to the method it will pursue in seeking vindication of the employees' representation rights while permitting the offending party to enjoy at the ex-

> pense of public policy the fruits of such unlawful conduct. The fact that in an election a vote favorable to the union may obviate for it the necessity for pursuing the unfair labor practice route does not, in our view, warrant requiring that the union forfeit the right to request that the effect upon it of the employer's unlawful conduct be rectified when it develops that such conduct has been sufficiently onerous to interfere with the election and to cause a substantial deterioration in the union's [majority] status.

The rule set forth in *Aiello* was not a statutory command, but a matter of Board discretion. The Board was free to change the rule if it found it unsatisfactory in light of the policies of the Act. As shown above, the Board had rational grounds for so concluding. Accordingly, the *Bernel Foam* doctrine has been approved not only by the court below but by the other circuits which have considered it. *The Colson Corp.* v. *National Labor Relations Board*, 347 F. 2d 128 (C.A. 8), petition for certiorari pending, No. 468, this Term; *Irving Air Chute Co., Inc.* v. *National Labor Relations Board*, No. 29425 (C.A. 2), decided August 18, 1965, 59 LRRM 3052; see *National Labor Relations Board* v. *Flomatic Corp.*, 347 F. 2d 74 (C.A. 2).[13]

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[13] The *Aiello* rule was actually a departure from prior Board precedent, see, *e.g.*, *The M.H. Davidson Co.*, 94 NLRB 142; *Model Mill Co., Inc.*, 103 NLRB 1527. The earlier rule, which *Bernel Foam* in effect returns to, had been approved by the courts on many occasions. See *National Labor Relations Board* v. *Howell Chevrolet Co.*, 204 F. 2d 79 (C.A. 9); *National Labor Relations Board* v. *Model Mill Co.*, 210 F. 2d 829 (C.A. 6); *National Labor Relations Board* v. *Southeastern*

The *Flomatic* case, *supra*, is not to the contrary. The Second Circuit indicated its approval of the *Bernel Foam* doctrine (347 F. 2d at 79), but declined to enforce the bargaining order in *Flomatic* because of the special circumstances of that case. The court pointed out that, since no previous demand for recognition had been made by the union on the basis of its card majority, there was no violation of Section 8(a)(5) (*id.* at 76). And, although it recognized that a bargaining order could be an appropriate remedy for an 8(a)(1) violation, the court was of the view that, since the 8(a)(1) violation there was not "flagrant," a bargaining order was not justified in that case (*id.* at 78-80). Here, on the other hand, there was a refusal to bargain in violation of Section 8(a)(5), and the court of appeals sustained the Board's finding that the Company's violations of Section 8(a)(1) were "extensive and flagrant" (R. 295).[14] Indeed, the Second Circuit, in upholding the Board's bargaining order in *Irving Air Chute, supra*, distinguished its decision in *Flomatic* on just these grounds.

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*Rubber Mfg. Co., Inc.*, 213 F. 2d 11 (C.A. 5); *National Labor Relations Board* v. *Stow Mfg. Co.*, 217 F. 2d 900 (C.A. 2), certiorari denied, 348 U.S. 964.

[14] *Flomatic* involved one violation of Section 8(a)(1); a letter distributed by Flomatic's president the day of the election was found to contain promises of benefits contingent on defeat of the union. 347 F. 2d at 76-77. In contrast, the Section 8(a)(1) violations in this case involved, *inter alia*, threats of economic reprisals, coercive interrogation, and granting of substantial new benefits.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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